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Nos. 435 and 436

Supreme Court of the United States

OCTOBER TERM, 1957

No. 435

FEDERAL TRADE COMMISSION, *Petitioner*

v.

NATIONAL CASUALTY COMPANY

No. 436

FEDERAL TRADE COMMISSION, *Petitioner*

v.

THE AMERICAN HOSPITAL AND LIFE INSURANCE COMPANY

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE SIXTH AND FIFTH CIRCUITS

BRIEF FOR LIFE INSURANCE ASSOCIATION OF AMERICA, AMERICAN LIFE CONVENTION, AND HEALTH INSURANCE ASSOCIATION OF AMERICA AS AMICI CURIAE

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BRIEF FOR LIFE INSURANCE ASSOCIATION OF AMERICA, AMERICAN LIFE CONVENTION, AND HEALTH INSURANCE ASSOCIATION OF AMERICA AS AMICI CURIAE

STATEMENT OF INTEREST

The Life Insurance Association of America, the American Life Convention, and the Health Insurance Association of America are associations with a combined membership of 416 insurance companies. These

companies have in force approximately 96 percent of the legal reserve life insurance and 80 percent of the accident and health insurance in the United States. In connection with the sale of insurance these companies circulate advertising throughout the United States.

The question presented in these cases is whether the Federal Trade Commission may regulate the advertising of insurance in States where that advertising is regulated by State law. The petitioner contends for a system of dual regulation which, under statutes couched in broad terms and enforceable initially by administrative agencies, would lead inevitably to conflicts, would be burdensome and confusing both to the insurance industry and to the regulatory agencies involved, and would be directly contrary to the expressed will of Congress.

It is therefore of vital interest to the members of the above-named associations that the judgments of the Courts of Appeals in these cases be affirmed by this Court.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit in No. 435 (N.R. 216-225)[1] is reported at 245 F. 2d 883. The opinion of the Court of Appeals for the Fifth Circuit in No. 436 (A.R. 110-117) is reported at 243 F. 2d 719. The opinions of the Federal Trade Commission in No. 435 (N.R. 204-210) and in No. 436 (A.R. 68-108) are not yet reported.

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[1] We adopt the petitioner's use of the designation "N.R." to refer to the printed record in No. 435, Federal Trade Commission v. National Casualty Co., and the designation "A.R." to refer to the printed record in No. 436, Federal Trade Commission v. The American Hospital and Life Ins. Co.

JURISDICTION

The judgment of the Court of Appeals in No. 435 was entered on June 6, 1957 (N.R. 216). The judgment of the Court of Appeals in No. 436 was entered on April 9, 1957 (A.R. 117-118). The petitions for writs of certiorari were filed on September 6, 1957, and were granted on November 12, 1957 (355 U. S. 867). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

The Courts of Appeals for the Sixth and Fifth Circuits decided unanimously that the provisions of the Act of March 9, 1945, 59 Stat. 33, as amended, 15 U. S. C. §§ 1011-1015, and particularly the proviso to Section 2(b) of that Act, deprive the Federal Trade Commission of jurisdiction to regulate the health and accident insurance advertising of the National Casualty Company and The American Hospital and Life Insurance Company, respectively, in those States where that advertising is regulated by State law.

The question presented is whether these decisions are correct.

STATUTE INVOLVED

The Act of March 9, 1945, 59 Stat. 33, as amended, 15 U. S. C. §§ 1011-1015 (hereafter referred to as the McCarran Act) provides:

> *"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to

impose any barrier to the regulation or taxation of such business by the several States.

"Sec. 2.(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

"(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

"Sec. 3.(a) Until June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, and the Act of June 19, 1936, known as the Robinson-Patman Anti-discrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.

"(b) Nothing contained in this Act shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

"Sec. 4. Nothing contained in this Act shall be construed to affect in any manner the application to the business of insurance of the Act of July 5, 1935, as amended, known as the National Labor

Relations Act, or the Act of June 25, 1938, as amended, known as the Fair Labor Standards Act of 1938, or the Act of June 5, 1920, known as the Merchant Marine Act, 1920.

"Sec. 5. As used in this Act, the term 'State' includes the several States, Alaska, Hawaii, Puerto Rico, Guam, and the District of Columbia.

"Sec. 6. If any provision of this Act, or the application of such provision to any person or circumstances, shall be held invalid, the remainder of the Act, and the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected."

STATEMENT OF THE CASES

The Decisions of the Examiners and the Commission

No. 435

The National Casualty Company (hereafter referred to as "National") is a Michigan corporation engaged in the health and accident insurance business in all of the forty-eight States and in the District of Columbia and Hawaii. It is licensed in each of the States in which it does business. Its business is conducted through locally licensed agents in each of the States in which the Company is licensed (N.R. 32, 188).

National sends printed brochures from its home office in Detroit, Michigan, to its agents in other States, which the agents display or distribute to prospective policy holders for the purpose of soliciting health and accident insurance business. National also sends brochures from its home office directly to prospective policy holders for the same purpose. Less than five percent of the total number of brochures used by National are sent directly to prospective policy holders (N.R. 188). These are the only types of advertising as to

which findings were made by the Commission (N.R. 204). Applications for policies secured by National's agents in States other than Michigan are normally mailed to National's home office, where the policies are issued and mailed to the agents for delivery to the new policy holders. A small number of National's agents have the authority to issue policies themselves, subject to subsequent approval by the home office (N.R. 189).

The Federal Trade Commission, purporting to act pursuant to the provisions of the Federal Trade Commission Act, 38 Stat. 717 (1914), as amended, 15, U. S. C. §§ 41-58, issued a complaint charging that National's brochures contained false, misleading, and deceptive representations (N.R. 2-11). National contended that because of the provisions of the McCarran Act the Commission had no jurisdiction of the subject matter of the complaint (N.R. 11-14).

The Examiner agreed that the Commission had no jurisdiction where there was State regulation (N.R. 201). He found, however, that in four States and in the District of Columbia there was no State legislation regulating health and accident insurance advertising (N.R. 200). The Examiner also held that the five percent of National's brochures which are sent directly from the Company's home office to prospective purchasers in the States in which National is licensed could not be regulated by State law (N.R. 201).[2] The

[2] This brief will not attempt to discuss the Examiner's view that health and accident insurance advertising is in fact unregulated in a small number of States, and that the States are powerless to regulate advertising sent directly to prospective policy purchasers through the mails. The majority of the Commission did not rest their decision upon these grounds, but rather took

Examiner therefore sustained Commission jurisdiction to a limited extent. The Commission, in a three-to-two decision, overruled the Examiner insofar as his decision placed limits on Commission jurisdiction, and relying on its earlier majority opinion in *The American Hospital and Life Ins. Co.* (A.R. 68-87), held that the Commission had jurisdiction over all of National's advertising despite the provisions of the McCarran Act and irrespective of the existence of State regulation (N.R. 204-210). The Commission issued an order requiring the Company to cease and desist from making certain representations in its advertising (N.R. 210-213).

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the sweeping view that the existence of State regulation is irrelevant to Commission jurisdiction.

It should be pointed out, however, that Mississippi, one of the States classified by the Examiner as not regulating health and accident insurance advertising, adopted a comprehensive statute regulating insurance advertising subsequent to the report of the Examiner but prior to the decision of the Commission. Miss. Code Ann., §§ 5649-01 to -12. In the District of Columbia, also so classified, a statute specifically prohibiting the false advertising of health and accident insurance recently became effective. Pub. L. No. 334, 85th Cong., 2d Sess. (Feb. 22, 1958). Each of the other States referred to by the Examiner has, as part of its statute law, provisions regulating false and misleading advertising generally. See Vernon's Mo. Stat. Ann., tit. 24, § 561.660; Mont. Rev. Code, 1947, tit. 40, § 94-1819; R.I. Gen. Laws, 1957, Vol. 3, § 11-18-10.

That the use of the mails cannot insulate from State control activities unlawful under State law has long been clearly established. See, *e.g.*, Travelers Health Ass'n v. Virginia, 188 Va. 877, 51 S. E. 2d 263, affirmed on other grounds, 339 U. S. 643; West Virginia v. Adams Express Co., 219 Fed. 794; *cf.* McGee v. International Life Ins. Co., 355 U. S. 220. In United States v. Sylvanus, 192 F. 2d 96 (C.C.A. 7), certiorari denied, 342 U. S. 943, the sole case relied on by the Examiner to support his novel conclusion, the court expressly recognized that the transaction there involved, consummated through the mails, was regulable by the State. See 192 F. 2d at 100.

No. 436

The American Hospital and Life Insurance Company (hereafter referred to as "American") is a Texas corporation engaged in the health and accident insurance business in Texas and in thirteen other States. It is licensed in each of the States in which it disseminates advertising in connection with its business (A.R. 69). Its business is conducted through locally licensed agents in each of the States in which the Company is licensed (*Ibid.*).

American sends printed brochures from its home office in San Antonio, Texas, to its agents in other States which the agents display or distribute to prospective policy holders for the purpose of soliciting health and accident insurance business. This is the only type of advertising in which American engages. Applications for policies secured by American's agents in States other than Texas are mailed to American's home office, where the policies are issued and mailed to the agents for delivery to the new policy holders (*Ibid.*). In each of the States into which American sends its brochures State statutes forbid the use of misleading and false representations in the sale of insurance.

The Federal Trade Commission, purporting to act pursuant to the provisions of the Federal Trade Commission Act, issued a complaint charging that American's brochures contained false, misleading, and deceptive representations (A.R. 5-12). American contended that because of the provisions of the McCarran Act the Commission had no jurisdiction of the subject matter of the complaint (A.R. 12-22). The Examiner agreed that the Commission had no jurisdic-

tion where there was State regulation (A.R. 33).[3] The Commission, in a three-to-two decision, rejected this contention, held that it had jurisdiction despite the existence of State regulation, and issued an order requiring the Company to cease and desist from making certain representations in the brochures that are sent from Texas into other States and used there to solicit business (A.R. 60-68).

The Decisions of the Courts of Appeals

After the Federal Trade Commission issued its orders, National and American petitioned for review in the Courts of Appeals for the Sixth and Fifth Circuits, respectively. In each case the Court of Appeals unanimously held that the Federal Trade Commission was without jurisdiction over the advertising practices of the petitioner in States where these advertising practices were regulated by State law. The Court of Appeals for the Fifth Circuit set aside the Commission's order against American without remand (A.R. 117-118). The Court of Appeals for the Sixth Circuit set aside the Commission's order against National, and remanded the cause to the Commission for further proceedings not inconsistent with its opinion (N.R. 216).

SUMMARY OF ARGUMENT

I

The language of the McCarran Act makes it plain that the Federal Trade Commission Act does not apply

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[3] The Examiner found that each of the States in which American disseminates advertising except Mississippi had legislation comprehensively regulating American's advertising (A.R. 33-37). Mississippi adopted such a statute prior to the decision of the Commission. See note 2, *supra*.

to insurance activities that are covered by State legislation. The provisions of Section 2 of the statute, and particularly the words of the proviso to subsection (b) of that section, are decisive on this point.

The words of the proviso precisely define "the extent" to which the Federal Trade Commission Act is to apply to the business of insurance; the operative and controlling words are "to the extent that such business is not regulated by State law". The "extent" is thus explicitly stated in terms of the absence of "State law". These words plainly mean that the Federal Trade Commission Act is not to apply to any aspect of the business of insurance that is covered by a State regulatory statute.

Both the words and the structure of the statute are inconsistent with the interpretation that petitioner now advances. Given their ordinary meaning the words of the proviso to Section 2(b) do not, as petitioner contends, provide for a condition of general concurrent jurisdiction, under which the Federal Trade Commission Act would continue to apply to the advertising of any particular insurance company unless a State formally and explicitly sanctioned that advertising by legislation or after formal hearing.

If, as petitioner contends, the Act was intended to provide for concurrent jurisdiction, with State supremacy in the event of conflict, the proviso to Section 2(b) would have been unnecessary, since it would have added nothing to the meaning of the opening clause of the subsection. Petitioner's argument, therefore, requires the Court to read the proviso as simply a repetition of the opening clause and as unnecessary and meaningless. The Federal Trade Commission it-

self in its opinion recognized the indefensibility of this construction and expressly repudiated it.

There is no merit in petitioner's suggestion that conduct covered by a State statute is not "regulated" until the State statute is formally enforced against or applied to the particular conduct in a way that conflicts with Federal Trade Commission regulation. The words of the proviso—"regulated by State law"—are clearly directed to the existence of State legislation covering insurance activities; the words do not connote or suggest that the operation of the proviso depends upon the actual application of a State statute in a particular proceeding, much less upon its being applied so as to produce a particular kind of result. The elaborate and artificial distinctions which petitioner attempts to read into the plain language of the proviso to Section 2(b) are unjustified by the words of the proviso and are inconsistent with the fact, conceded by petitioner, that Congress in passing the McCarran Act intended that State rather than Federal policies should control in the regulation of the insurance business.

II

The legislative history confirms the plain meaning of the words of the statute and shows that the Federal Trade Commission Act is not to apply to the business of insurance to the extent that the business is regulated by State law.

The proviso to Section 2(b) was first added to the bill in the conference that took place between the two houses. There is no comment upon it either in the Conference Report nor in the statement that accom-

panied the report, and it was not debated in the House of Representatives. In the Senate, however, a considerable debate took place regarding the proviso prior to approval of the Conference Report.

In the course of this debate Senators McCarran and Ferguson, two of the conferees on behalf of the Senate, made it perfectly plain that the statutory intent was that once the States had enacted regulatory legislation dealing with the same subject matter as that covered by the three Federal statutes enumerated in the proviso, the application of those three Acts should cease *in toto*. The debates flatly contradict petitioner's suggestions that Congress intended a distinction between the effect of State legislation "consistent" with and State legislation "inconsistent" with the enumerated Federal statutes, or a distinction between State regulatory "legislation" and State "enforcement".

III

Each of petitioner's arguments appears to depend upon the assertion that in the present cases there is no conceivable conflict between State and Federal policy. Counsel urge that only in cases where an open and immediately apparent conflict is presented should the McCarran Act be read as ousting Federal Trade Commission jurisdiction.

The difficulty with this assertion is that it fails to take account of the words of the statute but instead addresses itself to a hypothetical legislative problem. Before *United States* v. *South-Eastern Underwriters Ass'n*, 322 U. S. 533, the subject matter covered by the three Federal statutes named in the proviso had been subject to exclusive State regulation; it is therefore not surprising that Congress saw fit to return to the

States a measure of the exclusive jurisdiction which they had long possessed.

The analogies asserted by the petitioner between the McCarran Act and the Twenty-first Amendment and Federal Power Act are defective. There is no language in the Twenty-first Amendment that even remotely resembles the language of the proviso to Section 2(b) of the McCarran Act. The Federal Power Act and the McCarran Act are based on wholly different premises, the former accepting the limits on State power imposed by the Commerce Clause and the latter altogether removing those limits. Indeed, petitioner makes no contention that the McCarran Act confirms the supremacy of Federal law and imposes exclusive Federal jurisdiction over broad regulatory areas, as the Federal Power Act has been held to do.

IV

The proviso to Section 2(b) of the McCarran Act states that the Federal Trade Commission Act shall not apply to the business of insurance to the extent that that business is regulated by State law. Counsel for the Commission urge that whereas conduct authorized by permissive State statutes may properly be said to be "regulated by State law", conduct outlawed by prohibitory State statutes "general in scope" and providing for administrative enforcement is not so regulated until the administrative enforcement has actually taken place.

There is nothing in the words of the McCarran Act or in its legislative history which lends support to this strained interpretation. It appears to be based largely upon a misconception of the nature of State statutory standards in the area of insurance advertis-

ing and disregards the great likelihood of actual conflict between State and Federal regulatory authority if only formal affirmative action by the former can serve to oust the jurisdiction of the latter. Petitioner's argument ignores the fact that proper State administration may involve a considered determination that formal affirmative action is unnecessary.

Like the Federal Trade Commission Act, the Model State Fair Trade Practices Act for insurance, already adopted by 41 States, provides for no procedure whereby insurance companies may tender advertising for administrative scrutiny and approval before its dissemination. In these circumstances the fact that the records in these cases do not disclose formal action by State agencies directed to the advertising here in question does not establish State dereliction or lack of diligence. Petitioner's assumption that no conflict is possible in the administration of Federal and State legislation under the system of concurrent jurisdiction for which it contends is the negation of the flexibility of the administrative process.

V

Petitioner contends that the application of the McCarran Act according to its plain terms would necessarily result in a "regulatory no man's land" which Congress could not have intended. In terms of the facts in the present cases this argument is fanciful and hypothetical; in these cases the alleged "no man's land" does not exist.

National and American are licensed in every State in which they disseminate advertising, and depend on the services of licensed local agents in each of these

States. Under these circumstances it is indisputable that each of the States in which respondents disseminate advertising possesses, and can effectively exercise, the power to regulate the advertising disseminated within its borders. When all the States have legislated, no possible gap remains.

The fact that permitting the application of the Federal Trade Commission Act might be "convenient" is entirely irrelevant. Congress in passing the McCarran Act was concerned not with convenience but with preserving to the States governmental powers which they had long exclusively exercised.

ARGUMENT

Preliminary Statement

In June 1944 this Court decided for the first time that the business of insurance when transacted across State lines is interstate commerce and subject to regulation by Congress under the Commerce Clause. *United States* v. *South-Eastern Underwriters Ass'n*, 322 U. S. 533. For seventy-five years prior to that decision this Court had held that the Commerce Clause placed no restriction upon the power of the States to tax and to regulate the insurance business. As a result the States over the years had developed comprehensive regulatory and taxing systems which applied to insurance in ways and to limits that might not have been possible if State authority had been subject to Commerce Clause limitations.

The decision in the *South-Eastern Underwriters* case had two consequences that gave rise to grave concern on the part of the States, the insurance industry, and Congress. The first was that the decision subjected State authority for the first time to the limita-

tions of the Commerce Clause and thereby threatened the validity of existing State tax and regulatory systems. This was the result of the holding that insurance was "commerce" and when conducted across State lines was "interstate commerce".

The second consequence was that the decision, by subjecting the insurance business to the Sherman Act, indicated that it was also subject to other Federal regulatory statutes of general application which had been enacted by Congress under the Commerce Clause. Although the terms of those statutes properly could be read as applying to insurance, the statutes had not been drafted or passed with reference to the peculiar problems of the insurance business. For that reason it was evident that their unqualified application to insurance would create serious problems of legislative policy and might have effects not foreseen or intended by Congress when the statutes were passed.

Nine months after the *South-Eastern Underwriters* decision Congress dealt with these consequences by passing the McCarran Act. Both the words of the statute and its legislative history make it clear beyond dispute that in passing the statute Congress intended to accomplish two purposes. In the first place Congress intended that the States should be permitted to continue to regulate insurance free from Commerce Clause limitations, as had been the case prior to the decision in *South-Eastern Underwriters*. In the second place Congress intended that in general, but subject to particular exceptions, insurance should not be regulated by Federal statutes but by State law. To that end Congress included in the statute specific limitations on the application of Federal statutes to the insurance business.

The Federal Trade Commission now contends that its authority under Section 5 of the Federal Trade Commission Act extends to insurance advertising practices that are regulated by State law. In the first instance the Commission sought to justify this assertion of authority by an interpretation of the McCarran Act that gave supremacy to Federal law (see pp. 22-23, *infra*). In this Court counsel for the Commission have nominally retreated from this position; they now assert that the statute permits the exercise of concurrent jurisdiction but that in case of conflict State authority will prevail.

This reading of the statute is accompanied by asserted conditions and limitations which are of the utmost importance in understanding the nature and consequences of petitioner's argument. For one thing petitioner asserts that the Federal Trade Commission may always exert its authority unless the State laws have been actually enforced against, *i.e.*, specifically "applied" to, the particular transactions involved (Pet. Br., pp. 36, 53). The interpretation is further amplified by the suggestion that Federal authority may be exerted unless State law has been enforced against the particular transactions involved in such a way as formally to sanction advertising practices that the Federal regulatory authority wishes to forbid (Pet. Br., pp. 49-50). And the interpretation is still further amplified by the additional suggestions that if the Federal Trade Commission first asserts its jurisdiction by issuing a complaint against certain practices it cannot be deprived of jurisdiction by the subsequent action of a State agency, and, moreover, that if the Federal Trade Commission first proceeds to decision in an administrative proceeding that de-

cision will be *res judicata* as to the legality of the particular practices involved in such a way as to preclude any contrary exertion of State authority (*id.* p. 50 n. 32).

Under petitioner's construction of the statute neither an administrative conclusion reached by State regulatory authority that particular advertising practices are lawful and should not be the subject of a formal adversary proceeding, nor informal approval of particular advertising practices by that regulatory authority after consultation with the insurer involved—both normal and proper exercises of discretion by law enforcement officers—will serve to prevent the application and enforcement of the Federal Trade Commission Act.

It thus appears that in its effort to give content to its interpretation of the statute petitioner has robbed the abstract concession of State supremacy of all practical consequence or significance. This attempt to superimpose Federal authority upon State law, and to do so in terms which, despite petitioner's disclaimer, give practical supremacy to Federal authority, requires the McCarran Act to be read as if the proviso to Section 2(b) had no real meaning and disregards the manifest Congressional purpose that insurance practices should generally continue to be regulated by State law and not by Federal statutes.

Although petitioner denies that conflict could result from its interpretation of the Act, it is evident that the proposed construction would set petitioner up as the arbiter of the effectiveness of State regulation. Its decisions would necessarily be affected, even if only unconsciously, by a preference for its own regulation.

It is difficult to conceive of a surer road to Federal-State conflicts.

The arguments by which petitioner seeks to justify this result pay singularly little attention to the words of the McCarran Act or to the structure of the Act as a whole and either misconstrue or ignore decisive passages in the legislative history of the Act. Indeed, those arguments largely rest upon alleged grounds of policy which are without merit, and which in any event are more appropriate for legislative than for judicial consideration.

1. THE LANGUAGE AND GENERAL STRUCTURE OF THE MCCARRAN ACT SPECIFICALLY PRECLUDE THE ASSERTION BY THE COMMISSION OF JURISDICTION OVER INSURANCE ACTIVITIES AS TO WHICH THE STATES HAVE LEGISLATED

The McCarran Act opens with an unequivocal declaration of Congressional intention to place the responsibility for regulation of the insurance business in the hands of the States, which had held and exercised that responsibility before *South-Eastern Underwriters*. The first section states:

> "That the Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States."

The provisions of Section 2 of the Act, and particularly the words of the proviso attached to subsection (b) of Section 2, are decisive of the basic juris-

dictional issue in these cases. Subsection (a) of Section 2 provides that:

> "The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business."

Having thus provided without qualification that the business of insurance shall be subject to State regulation and taxation, Congress proceeded in subsection (b) of Section 2 to impose limitations upon the application of Federal regulatory statutes to the business of insurance.

Section 2(b) in its entirety reads as follows:

> "(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided,* That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law."

The words of the proviso precisely define "the extent" to which the Federal Trade Commission Act is to apply to the business of insurance. The "extent" is explicitly stated in terms of the absence of regulation "by State law". The Federal Trade Commission Act is to apply to the business of insurance only to the extent that the business is not regulated by State law,

or, to state the matter in another way, if the business of insurance is regulated by State law then the Federal Trade Commission Act is not to apply. This reading of the proviso does not depend upon inference or implication; it is required by the plain and ordinary sense of the words which Congress chose to express its meaning.[4]

This view of the proviso is confirmed when its terms are contrasted with those used in the opening clause of Section 2(b). That clause provides in general terms that Federal statutes which do not specifically refer to insurance shall not invalidate, impair, or supersede State regulation or taxation. This language imposes a general limitation upon the application of a category of Federal statutes to the insurance business, the category of statutes being those that do not specifically refer to insurance and the limitation being that the statutes are not to apply in such a way as to invalidate, impair, or supersede State regulation or taxation. In the proviso Congress saw fit to deal explicitly with three named statutes, including the Federal Trade Commission Act, by imposing a specific limitation—that in any event those three statutes should not be applicable to the insurance business to the extent that such business is regulated by State law.[5]

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[4] The words were so understood in Congress when the proviso was under consideration, as we shall show later in the discussion of the legislative history. See pp. 27-37, *infra*.

[5] The legislative history shows that Congress attempted to deal specifically in various sections of the McCarran Act with the particular Federal statutes whose application to the business of insurance it was believed might create problems in Federal-State relationships. Thus in the proviso to Section 2(b) and in Sec-

It would thus appear that if the proviso to Section 2(b) is to be read as meaning what it says, the Federal Trade Commission Act is rendered inapplicable to National's and American's advertising practices by the existence of State regulatory legislation.

The majority of the Commission reached, and the petitioner here urges, a contrary conclusion. The Commission construed the proviso to Section 2(b) as meaning that the Federal Trade Commission Act shall apply to the "purely interstate" aspects of the activities of insurance companies even though the same activities are regulated by State law. The reasoning by which the Commission reached this conclusion did not depend upon the words of the statute—and indeed is antithetic to them—but as the Commission itself indicated was based upon certain assumptions with respect to constitutional limitations imposed by the Commerce Clause on the authority of the States to regulate interstate commerce.

The Commission's premise was that the Commerce Clause of its own force prevents the States from regulating interstate commerce, and that Congress has not removed and cannot remove this disability as to the regulation of interstate insurance transactions. Since the jurisdiction of the Federal Trade Commission is

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tions 3 and 4 Congress legislated explicitly as to the application of named statutes to the business of insurance. By contrast the opening clause of Section 2(b), which speaks in general terms, was obviously directed solely to any problems created by existing statutes overlooked by Congress or by future statutes. Thus in the debates the opening clause of Section 2(b) was described by Senator O'Mahoney as "a sort of catch-all provision to take into consideration other acts of Congress which might affect the insurance industry, but of which we did not have knowledge at the time" (91 Cong. Rec., Part 1, p. 483).

in any event restricted to practices "in" interstate commerce, *Federal Trade Commission* v. *Bunte Bros., Inc.*, 312 U. S. 349, the Commission was forced by its premise to the incongruous conclusion that the last twelve words of the proviso to Section 2(b)—"to the extent that such business is not regulated by State law"—have no meaning whatever as applied to the Federal Trade Commission Act. For on the Commission's theory the Federal Trade Commission Act would continue to apply to all the activities to which it had ever applied, even though it "in one sense would supersede a State law covering the same subject matter in a different and local phase of the transaction" (A.R. 75).[6]

Counsel for the Commission appear now to concede that the premise upon which the Commission proceeded is erroneous (Pet. Br., pp. 38-39, 41). They recognize, as they must, that "Congress has undoubted power to redefine the distribution of power over interstate commerce", *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761, 769, and that the McCarran Act is an exercise of this power, *Prudential Ins. Co.* v. *Benjamin*, 328 U. S. 408. They continue to urge, however, that the terms of the McCarran Act, and particularly the words of the proviso to Section 2(b), do not prevent the exercise of Federal Trade Commission jurisdiction in the cases before this Court.

To reach this result counsel have rejected the Commission's construction of the statute, and have adopted a construction explicitly repudiated by the Commis-

[6] The Commission thus treated the Federal Trade Commission Act as if it had been among the statutes listed in Section 4 of the McCarran Act, the application of which the latter Act was not to "affect in any manner".

sion. The Commission had concluded that in the event of conflict between the terms or application of the Federal Trade Commission Act and State legislative provisions the former must prevail, because Congress must have "contemplated that under certain conditions the Federal Trade Commission Act might supersede a State law purporting to regulate the business of insurance but not covering all aspects thereof" (A.R. 75). Counsel now dismiss this conclusion as only *obiter dicta,* recognizing that the *Prudential* case and *North Little Rock Transportation Co.* v. *Casualty Reciprocal Exchange,* 181 F. 2d 174 (C.C.A. 8), *certiorari denied,* 340 U. S. 823, establish the contrary (Pet. Br., pp. 36-37 n. 24). They now advance a theory of general concurrent jurisdiction, under which the Federal Trade Commission Act would continue to apply to the advertising of any particular insurance company unless the States formally and explicitly sanctioned that advertising, by legislation or after formal hearing.

As we have pointed out, the Federal Trade Commission construed the proviso in a manner that flatly disregarded the overall structure of the statute by giving the Federal Trade Commission precisely the same degree of jurisdiction that it would have had if reference to it had been contained in Section 4 of the statute, which lists the Federal regulatory statutes whose application to the business of insurance the McCarran Act was not to "affect in any manner".

Counsel for the Commission seek to avoid this difficulty by conceding that the Commission was in error in stating that the Federal Trade Commission Act would supersede State law in the event of conflict.

Their reading of the proviso, however, is subject to an equally serious difficulty of the same kind. Section 2(b) of the statute, apart from the proviso, provides that:

> "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: * * *"

On petitioner's construction of the proviso it becomes nothing more or less than a reiteration of the language above quoted. As the Federal Trade Commission itself recognized in its opinion, which explicitly rejects the interpretation of the proviso now urged by its counsel (A.R. 74):

> "* * * [I]f this proviso meant only that no action could be taken under the Federal Trade Commission Act which was in conflict with State law it was wholly unnecessary. The statute already had stated that no Act of Congress shall invalidate, impair, or supersede a State law unless it relates specifically to insurance."

There is no warrant for rendering meaningless, as petitioner's argument does, an integral part of the statute, and it is significant that the Federal Trade Commission itself recognized the indefensibility of such a construction and expressly repudiated it.[7]

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[7] Petitioner's theory of general concurrent jurisdiction, with State policy supreme in the event of conflict, is curiously contradicted even as it is advanced. Petitioner strongly implies that once a Commission complaint is carried to judgment, whether in favor of or against the respondent, the States are precluded from taking any action which would impair the force of the judg-

Commission counsel, in support of their theory of general concurrent jurisdiction, make one attempt to grapple directly with the words of the McCarran Act which are decisive in these cases—"to the extent that such business is not regulated by State law". They take the position that one who engages in conduct outlawed by a State statute providing for enforcement through an administrative process is not in fact "regulated by State law" until the statute has been actually enforced against him through formal proceedings.

This suggestion, which will be discussed in more detail later in our argument, must fail because it requires the acceptance of a distinction—between permissive and prohibitory legislation—which is nowhere remotely suggested in the McCarran Act; because it demands a reading of the Act which does violence to its words; and because it cuts strongly against the fact, conceded by Commission counsel, that Congress in passing the McCarran Act intended that State rather than Federal policy should control in the regulation of the insurance business. It requires the words "regulated by State law" in the proviso to Section 2(b) to be read as if they in fact said, "subject to a formal administrative determination arrived at in a State proceeding". There is no basis for thus substantially rewriting the words which Congress used to express its intention.

Another basic difficulty with counsel's interpretation is that it is nowhere explained why, if the statute

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ment reached in the Federal proceeding (Pet. Br., p. 50 n. 32). The applicability of State law to an insurance company's advertising practices is thus potentially made to depend upon whether those practices are first challenged by State or Federal authority. It is difficult to see anything in the McCarran Act which supports this undeniably bizarre result.

means what counsel would have it mean, Federal Trade Commission jurisdiction is ousted only in the event of a formal State administrative determination, made prior to the exercise of that jurisdiction, that particular advertising does *not* violate State law. Necessarily advertising which has been formally challenged and found illegal is even more "regulated" than advertising which has been formally approved. Yet counsel urge that the McCarran Act basically contemplates a concurrency of State and Federal jurisdiction, with the latter being ousted only in the event of direct, open, and unmistakable conflict. Under these circumstances, counsel's single attempt to come to grips with the relevant statutory language results in a contradiction, rather than a justification, of their basic theory.

II. The legislative history of the McCarran Act shows that Congress intended that Federal Trade Commission jurisdiction should exist only in the absence of State legislation

We have pointed out that the words of Section 2(b) of the McCarran Act, read without the assistance of any extrinsic aids to construction, plainly provide that the Federal Trade Commission Act is not to apply to the business of insurance to the extent that the business is regulated by State law. The legislative history confirms the plain meaning of the words of the statute. It may be briefly summarized.

The proviso to Section 2(b) was not contained in the bills as first passed by the House of Representatives and the Senate. Those bills simply provided without qualification that nothing contained in the Federal Trade Commission Act should apply to the

business of insurance (91 Cong. Rec., Part 1, p. 1085). The Committee Reports on those bills therefore throw no direct light on the meaning of the proviso to Section 2(b).

The proviso was added to the bill in the conference that took place between the two houses. Neither the Conference Report nor the statement that accompanied the report to the House of Representatives (*id.* pp. 1357, 1396) contained any comment on the new proviso to Section 2(b). In the House of Representatives the Conference Report was approved without debate (*id.* pp. 1395-1396). In the Senate, however, the proviso to Section 2(b) was discussed prior to approval of the Conference Report, and the statements made in the course of that discussion make it abundantly clear that the proviso was understood as meaning that the Federal Trade Commission Act and the other statutes enumerated in the proviso to Section 2(b) should not apply to the business of insurance to the extent that the States had enacted legislation for its regulation.

At the very beginning of the consideration of the Conference Report in the Senate the following colloquy took place (91 Cong. Rec., Part 2, p. 1442):

> "Mr. Murdock. As I understand the conference report which is now before the Senate, it provides for a 3-year moratorium, which is fixed as ending on January 1, 1948, against the invoking of the Sherman Act and the Clayton Act, and it provides that they shall again be in force after that period without any affirmative action on the part of the Congress, except as regulatory matters have been enacted by the States relating to subjects covered by those acts—

"Mr. McCarran. During the moratorium. Regulatory acts must be enacted by the several States in each of the several States. Otherwise the antitrust acts become effective after January 1, 1948.

"Mr. Murdock. But is it not the purpose of the bill and does not the bill accomplish this—

"Mr. McCarran. It accomplishes a moratorium for 3 years against the operation of the acts mentioned, namely, the Sherman Antitrust Act, the Clayton Act, the Federal Trade Commission Act, as amended, and the Robinson-Patman Antidiscrimination Act.

"Mr. Murdock. So that during the moratorium it is intended, is it not, that the States shall affirmatively step into the regulation of the insurance business?

"Mr. McCarran. That is correct.

"Mr. Murdock. And it is intended that on the expiration of the moratorium the Sherman Act, the Clayton Act, and the other acts mentioned will again become effective except—

"Mr. McCarran. Except as the States themselves have provided regulations."

This colloquy can only mean that the enactment of legislation by any State—whether that legislation be consistent or inconsistent with the enumerated Federal statutes—would *ipso facto* displace Federal jurisdiction under these statutes as to the subject matter covered by the State regulatory legislation.

Shortly thereafter, Senator Pepper read to the Senate the complete text of Section 2, stating that he was "a little disturbed" by what he discovered in paragraph (b) of Section 2. The following colloquy then ensued (*id.* p. 1443):

"Mr. Pepper. * * * Does that mean that after January 1, 1948, the States may determine

whether or not the Sherman and the other acts become applicable to the business of insurance?

"Mr. McCarran. The answer to that question is 'Yes.' During the 3-year moratorium the States may, if they see fit to do so, enact legislation for the purpose of regulation. If they do enact such legislation, to the extent that they regulate they will have taken the business of insurance in the respective States out from under the Sherman Anti-trust Act, the Clayton Act, and the other acts. If during the moratorium the States do not enact legislation for regulatory purposes, then on January 1, 1948, the Sherman Act, the Clayton Act, and the other acts will become immediately applicable.

* * *

"Mr. Pepper. * * * Apparently the conference report goes further than I had understood it to go. It does not stop with a moratorium at the end of 3 years. At the end of 3 years the moratorium would continue if in the meantime a State had regulated the business to any extent whatever. That would defeat the Supreme Court decision.

"Mr. McCarran. The moratorium would not be continued, *but if in the meantime the States themselves had regulated the business of insurance, the Sherman and Clayton Acts and the other acts would not become effective.*" (Emphasis added)

Petitioner suggests that a part of this passage "would seem to give affirmative support to the Government's position" (Pet. Br., p. 58). Counsel assert that when Senator McCarran said "If they do enact such legislation, to the extent that they regulate, etc. * * *" he was distinguishing between "legislation" and "regulation" and that his statement therefore supports the inference that he meant that the enactment of legislation is insufficient and the proviso re-

quires that a State actually enforce its legislation against particular transactions (*id.* pp. 58-59).

The language of Senator McCarran provides no rational basis for this inference. In context the words "to the extent that they regulate" simply mean that unless the States have legislated as to subject matter covered by the named Federal statutes, then those statutes will apply. It is also clear that in his discussion of the legislation Senator McCarran used the words "legislation" and "regulate" as meaning the same thing. In the very passage to which the petitioner refers, Senator McCarran explicitly stated that the applicability after the expiration of the moratorium of the statutes enumerated in the proviso would depend upon the failure of the States to "enact legislation", and a few minutes earlier he had said that "regulatory acts must be enacted by the several States in each of the several States. Otherwise the antitrust acts become effective after January 1, 1948".

Senator Ferguson thereafter confirmed the previous answer of Senator McCarran in these words (91 Cong. Rec., Part 2, p. 1443):[8]

> "Mr. Ferguson. * * * After the moratorium has expired, if a State has not legislated on the subjects covered by the three acts to which reference has been made, those acts shall be applicable to the business of insurance. ***But insofar as the State is concerned which has specifically legislated on the subject, the three acts shall not apply.***" (Emphasis added)

This is not the language of concurrent jurisdiction. It would be difficult to express in plainer terms the

[8] Senators McCarran and Ferguson were two of the conferees on behalf of the Senate.

statutory intent, that when the States have legislated the application of the three Acts ceases *in toto*.

Even more plainly contradicting the petitioner's suggestion that Congress intended that only State law explicitly sanctioning false advertising should oust Commission jurisdiction are two exchanges which took place between Senator McCarran and Senator Pepper during the debate in the Senate. Senator Pepper, attacking the proviso to Section 2(b), stated (*id.* p. 1444):

> "[T]he legal effect of the proviso which the Senator has just read is that a State can absolutely prevent the applicability of the Sherman Antitrust Act and the Clayton Act to insurance companies doing business in the State *by passing a State act which will make combinations and restraints of trade unlawful in that State.* As a practical matter, we know that the States cannot and will not enforce these laws against these insurance companies." (Emphasis added)

Senator McCarran, who was engaged in explaining the proviso to the Senate, said nothing to contradict the interpretation thus offered, but contented himself with concurring with a statement by Senator White that the Federal acts would continue to apply in areas not reached by State legislation.

In the next day's debate Senator Pepper again stated his understanding of the proviso to be that (*id.* p. 1478):

> "* * * for all future time the Sherman Act, the Clayton Act, and the Federal Trade Commission Act shall not apply to the business of insurance except in a State which has not regulated the in-

surance business or to the extent a State has not denied the effect of such Federal acts.

"Mr. President, if that language had contained the limitation that the State regulation, in order to be valid, must not be inconsistent with the Clayton Act or the Sherman Act, I should have no objection to it."

Again Senator McCarran took no exception to the accuracy of Senator Pepper's interpretation, merely responding that "the Congress of the United States would not attempt to tell a State how and upon what subject it should legislate" (*id.* p. 1479).

In its discussion of the legislative history petitioner relies heavily upon certain remarks of Senator Ferguson to the effect that State regulation contrary to the Sherman, Clayton, or Federal Trade Commission Act would, except in the instances set forth in Section 3(b), control (Pet. Br., p. 59). We fully agree that the passages cited are, as far as they go, an accurate description of the effect of the McCarran Act. Petitioner, however, seeks to draw from them the negative inference that it was the intention of the proviso to Section 2(b) that State legislation consistent with the Acts there cited would not oust Federal jurisdiction.

This reasoning will not bear examination. The passages to which petitioner refers appear in a debate in which Senator Ferguson was not abstractly expounding the meaning of the proviso, but was rather responding directly to a question by Senator Pepper expressly limited to the effect of the proviso when State regulatory statutes conflicted with the statutes there enumerated. Under these circumstances, a discussion of the inapplicability of the Federal legislation in the face of consistent State legislation would

have been simply unresponsive. The fact that Senator Ferguson did not here refer to this aspect of the proviso's effect thus provides no basis for the inference which petitioner seeks to draw.[9]

Counsel for the Commission also point to a colloquy on the Senate floor between Senators O'Mahoney and Pepper (Pet. Br., pp. 60-61). It is not altogether clear in what respect this colloquy is believed to support counsel's position. The statements by Senator O'Mahoney particularly relied upon, to the effect that "State regulation must be for the State and not for the United States" and that "nothing in the proposed law would authorize a State to try to regulate for other States" appear to be merely a recognition that there are jurisdictional limits upon regulation by a State of activities which do not impinge upon its borders, and as to which it has no legitimate local interest.

These statements are entirely consistent with the express statements made in the Senate which have been quoted at pages 28-33, *supra*, to the effect that when a State has legislated as to insurance activities affecting it, the Federal Trade Commission Act and the other statutes named in the proviso to Section 2(b) are not to apply as to that State. The entire colloquy shows that Senator O'Mahoney's statements were not intended to suggest any doubt about the capacity of a State to regulate insurance transactions in which the State has a legitimate interest even though the regulation might apply to transactions in interstate

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[9] In the previous day's debate, Senator Ferguson had made it clear that the proviso would come into play whenever a State had "specifically legislated" on the subject matter of the three statutes named in the proviso. See p. 31, *supra*.

commerce. See particularly the exchange between Senators Pepper and Ferguson with respect to the activities of rate-making bureaus at 91 Cong. Rec., Part 2, p. 1484.

Finally, petitioner devotes considerable attention to statements made on the floor of the House during a debate which took place before the proviso was added to Section 2(b) in conference. These statements are said to indicate a "desire to continue the application of the Federal Trade Commission Act to false advertising of insurance" (Pet. Br., pp. 62-64). The difficulty with this reasoning is that the remarks referred to were made at a time when the draft Act contained a provision flatly exempting the business of insurance from the Federal Trade Commission Act, whether or not the States had regulated the same subject matter. Under these circumstances, it is not surprising that concern was expressed over the possibility that various unfair practices in the insurance industry would not be interdicted by either State or Federal law. The elimination of this exemptive provision and the addition of the proviso were directly responsive to this concern, since by the terms of the proviso Federal law continues to apply unless displaced by State legislation.

The notion that the proviso to Section 2(b) requires something more than the enactment of legislation by the States, or that the application of the proviso depends in any way upon the diligence of the enforcement efforts made by States under their legislation, is flatly inconsistent with statements made in the Senate when the proviso was under consideration. For example, Senator Barkley, shortly before the Senate voted on the bill, stated (91 Cong. Rec., Part 2, p. 1488):

"I have been somewhat disturbed by the provision in subsection (b) of section 2 of the conference report. However, I think that under the interpretation given it by the conferees my doubts have been resolved, and I intend to vote for approval of the conference report. But I wish it to be understood that in voting for approval of the conference report I am accepting the interpretation placed upon it by the conferees, namely, that if any State, through its legislature, undertakes to go through the form of regulation merely in order to put insurance companies within that State on an island of safety from congressional regulation, that effort will be futile, and not only can Congress deal with any phase of the insurance business not dealt with by a State legislature, but even in a case in which a State legislature deals with any phase of it, but does not deal with it adequately in the opinion of Congress, Congress is not in any way barred by the conference report from dealing with that subject and with the phase of it which Congress deems to have been inadequately dealt with by the State; so that hereafter we can enact such legislation as we may deem proper and wise to have enacted in connection with the regulation of this business, which clearly is interstate commerce."

This passage is an explicit recognition of the fact that the proviso meant that the States might remove the insurance business from the ambit of the Sherman, Clayton, and Federal Trade Commission Acts by legislation covering the same ground, whether that legislation were consistent or inconsistent with the Federal statutes. Senator Barkley was willing to accept the bill because he recognized that Congress necessarily retained the power to alter the situation by future legislation if the cession of exclusive jurisdic-

tion to those States which chose to legislate proved unsatisfactory or unworkable.[10]

III. The arguments and authorities relied upon by petitioner do not support the suggestion that Congress intended that the McCarran Act should oust Federal Trade Commission jurisdiction only in the event of "inconsistent" state legislation

As we have seen, counsel for the Commission have abandoned the theory upon which the Federal Trade Commission upheld its own jurisdiction in these cases, recognizing that it was based upon an erroneous premise of constitutional law. Counsel now adopt legal theories which, although incompatible with the Commission's opinion and to some extent inconsistent with one another, permit them to reach a result identical with that reached by the Commission.

Each of petitioner's arguments appears to depend on the assertion that in the present cases there is no conceivable conflict between State and Federal policy—that "here the state statutes and the federal act are entirely consistent and complementary" (Pet. Br., p. 38).[11] Thus counsel point out that *North Little Rock Transportation Co.* v. *Casualty Reciprocal Exchange*, 181 F. 2d 174 (C.C.A. 8), *certiorari denied*, 340 U. S. 823, in which the proviso to Section 2(b)

[10] Statements of similar import were made by Senators McCarran and Murdock (91 Cong. Rec., Part 2, pp. 1478, 1482).

[11] This assertion disregards the fact that "A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law". Garner v. Teamsters Union, 346 U. S. 485, 490-491.

was read as precluding the application of Federal law, involved a situation where the conduct sought to be attacked under the Federal statute was specifically sanctioned by State law (Pet. Br., p. 37). Counsel urge that only in cases where this immediately apparent conflict is presented should the McCarran Act be read as ousting Federal Trade Commission jurisdiction.

The difficulty with this assertion is that it fails to take account of the words of the statute but instead addresses itself essentially to a hypothetical legislative problem.

Legislative policy is for Congress to determine, and diverse situations, each with the unique history and circumstances which surround it, call for different legislative solutions. In the passage of the McCarran Act, Congress was dealing with an area of regulatory jurisdiction which for seventy-five years had rested exclusively with the States until the decision in *South-Eastern Underwriters* served notice that Federal regulatory statutes of general application, promulgated under the Commerce Clause, would be read as applying to the interstate business of insurance. Under these circumstances it is not surprising that Congress saw fit, in the exercise of its plenary power over interstate commerce, to return to the States a measure of the exclusive jurisdiction which they had long possessed. As this Court has stated in *Wilburn Boat Co.* v. *Fireman's Fund Ins. Co.*, 348 U. S. 310, 320-321, with reference to another aspect of the insurance business:

> "Under our present system of diverse state regulations, which is as old as the Union, the insurance business has become one of the great enterprises of the Nation. Congress has been exceed-

> ingly cautious about disturbing this system, even as to marine insurance where congressional power is undoubted. We, like Congress, leave the regulation of marine insurance where it has been—with the States." [footnotes omitted]

Petitioner asserts that "the problem of determining the effect of the McCarran-Ferguson Act on federal authority over insurance is remarkably similar to the problem of determining the effect of the Twenty-first Amendment on federal authority over liquor" (Pet. Br., p. 39). In fact this analogy is fatally defective because there is nothing in the Twenty-first Amendment which states that Federal jurisdiction shall cease altogether in the event of State legislation. There is no language in the Twenty-first Amendment that even remotely resembles the language of the proviso to Section 2(b) of the McCarran Act. In the McCarran Act Congress used different words to express a different policy, by providing not only that State law might apply without impediment from the Commerce Clause, but that to the extent it did apply certain Federal laws would not.

Defective also, and for much the same reasons, is petitioner's attempted analogy between the McCarran Act and the Federal Power Act (Pet. Br., p. 50 and n. 33). This Court has never held that the words "not subject to regulation by the States" in Section 201(a) of the Federal Power Act can be wholly ignored or disregarded. On the contrary the Court in the very passage from *Connecticut Light & Power Co.* v. *Federal Power Commission*, 324 U. S. 515, 527, which is quoted in part in note 33 of petitioner's brief said, in words which counsel have chosen to omit from the quotation:

> "But such a declaration is relevant and entitled to respect as a guide in resolving any ambiguity or indefiniteness in the specific provisions which purport to carry out its intent. It cannot be wholly ignored."

In cases arising under the Power Act the Court has suggested that the general declaration in Section 201(a) cannot nullify a clear and specific grant of jurisdiction given to the Federal Power Commission by other provisions in the statute. *Connecticut Light & Power Co.* v. *Federal Power Commission, supra.* But that statement has no application here. Apart from the proviso to Section 2(b) there is no provision in the McCarran Act which makes a grant of jurisdiction to the Federal Trade Commission.[12] What counsel for the Commission are seeking to do is to excise from the only grant of jurisdiction that the McCarran Act makes to the Federal Trade Commission those words of the grant that limit Commission jurisdiction to matters "not regulated by State law". The decisions under the Federal Power Act provide no warrant for this kind of a surgical operation on the body of the proviso.[13]

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[12] The jurisdiction over the interstate business of insurance which the Federal Trade Commission Act itself might properly, after South-Eastern Underwriters, be read as granting is by no means "specific". As this Court pointed out in the Prudential case (328 U. S. at 415), during the 75 years before the decision in South-Eastern Underwriters "Congress legislated only in terms applicable to commerce generally, without particularized reference to insurance".

[13] The asserted analogy also disregards the wide difference between the premises of the McCarran Act and the Federal Power Act. The language of the Federal Power Act "indicates no consideration or desire to alter the limits of state power otherwise imposed by the constitutional commerce clause". United States v. Public Utilities Commission of California, 345 U. S. 295. As the

All of the available evidence indicates that the primary purpose of the McCarran Act was not to secure the uniformity under Federal law which is implicit in petitioner's theory of general concurrent jurisdiction. Rather, as this Court has stated in *Prudential Ins. Co. v. Benjamin*, 328 U. S. 408, 430, in passing the McCarran Act:

> "* * * Congress must have had full knowledge of the nation-wide existence of state systems of regulation and taxation; of the fact that they differ greatly in the scope and character of the regulations imposed and of the taxes enacted; and of the further fact that many, if not all, include features which, to some extent, have not been applied generally to other interstate business. Congress could not have been unacquainted with these facts and its purpose was evidently to throw the whole weight of its power behind the state systems, notwithstanding these variations."

IV. Insurance advertising is "regulated by state law" when states adopt comprehensive regulatory statutes specifically dealing with the subject

The proviso to Section 2(b) of the McCarran Act states that the Federal Trade Commission Act shall

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Prudential case establishes and the petitioner concedes, the McCarran Act did alter the limits of State power by removing all Commerce Clause impediments to its exercise.

The lack of similarity between the Federal Power Act and the McCarran Act is demonstrated by the fact that this Court has read the former, in the Public Utilities Commission of California case, as confirming the supremacy of Federal law and asserting exclusive Federal jurisdiction over broad regulatory areas. *Cf.* Natural Gas Pipeline Co. v. Panoma Corp., 349 U. S. 44. Petitioner makes no contention that the McCarran Act permits a like result.

not apply to the business of insurance to the extent that that business is regulated by State law. Building upon their premise that in the area of insurance advertising it is desirable as a matter of "policy" that Federal as well as State law shall apply, counsel for the Commission postulate a controlling distinction between permissive and prohibitory State statutes. They urge that whereas conduct authorized by the former may properly be said to be "regulated by State law", conduct outlawed by the latter is not so regulated within the meaning of the proviso until the statute has been actually enforced against it.

As we have pointed out above, there is nothing either in the words of the statute or in its legislative history which lends support to this strained interpretation. It appears to be based largely upon a misconception of the nature of State statutory and regulatory standards in the area of insurance advertising and disregards the great likelihood of actual conflict between State and Federal regulatory authority if only formal affirmative action by the former can serve to oust the jurisdiction of the latter. *Cf. Bethlehem Steel Co.* v. *New York State Labor Relations Board,* 330 U. S. 767.

Petitioner points to the fact that many of the State statutes providing for insurance regulation broadly prohibit "unfair methods of competition" and suggests that because of the breadth of this prohibition it cannot be regarded as "regulation" until content has been given to it by the completion of a particular enforcement proceeding. This argument is inapposite because we are not here concerned with the whole gamut of "unfair methods of competition" and "unfair or deceptive acts or practices" but rather only with advertising which is charged to be false. The

Model State Fair Trade Practices Act for insurance, already adopted by some 41 States and by Alaska, Hawaii, and Puerto Rico, contains a provision reading specifically on the dissemination of advertising which is "untrue, deceptive or misleading". See, *e.g.*, Kansas G. S., Art. 24, § 40-2404(2) (Supp. 1955), set forth at page 68 of petitioner's brief. This standard is fully as precise and explicit as that contained in Federal statutes the violation of which subjects the offender to judicial prosecution without any prior administrative proceeding. See, *e.g.*, Federal Food, Drug & Cosmetic Act, 52 Stat. 1047, 1049, 1054 (1938), 21 U. S. C. §§ 343(a), 352(a), 362(a).[14]

It is a perversion of language to suggest that the conduct of one subject to a State prohibitory statute is not "regulated" by that statute until a formal administrative proceeding challenging the conduct is undertaken and carried to completion. The fact that the sanction may, if the conduct is found to violate the law, in the first instance take the form of a cease-and-desist order rather than that of fine, imprisonment, or licen e revocation is irrelevant. That this choice of sanction is not unresponsive to the legislative problem to which it is directed is perhaps most economically demonstrated by the fact that the Federal Trade Commission Act, which the petitioner seeks here to apply, itself authorizes the imposition of only

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[14] In addition, on December 1, 1955, the National Association of State Insurance Commissioners promulgated a detailed set of Rules Governing Advertisements of Accident and Sickness Insurance, implementing and interpreting the State statutes governing misleading advertising. Already more than half of the States have put these Rules into effect and others are expected to follow. These Rules have been further supplemented by a detailed interpretative guide also prepared by the National Association of State Insurance Commissioners.

this sanction by the agency. Under the Model Act each violation of a cease-and-desist order is punishable by a fine and in the discretion of the administrator by revocation of the offender's license or certificate of authority to engage in the insurance business in the State.

The petitioner's position that under prohibitory State statutes there is no "regulation" without formal enforcement action ignores the fact that proper State administration may involve considered inaction as well as action. There are a variety of possible reasons why an administrator does not proceed to take action against a particular individual or corporation. Undoubtedly a most common one is that the individual or corporation has not, in the opinion of the administrator, violated the statute which the administrator is charged with enforcing. Like the Federal Trade Commission Act, the Model Act provides for no procedure whereby insurance companies may tender advertising for administrative scrutiny and approval before its dissemination. In these circumstances the fact that the records in these cases do not disclose formal action by State agencies directed to the advertising here in question does not establish State dereliction or lack of diligence.

There is necessarily room for differences of opinion as to whether any particular advertising phrase is "untrue, deceptive or misleading".[15] Administrative

[15] This fact is strikingly demonstrated in the present cases. In No. 435 the Hearing Examiner disagreed with the majority of the Commission as to whether certain advertising representations violated the Federal Trade Commission Act (N.R. 194), and in No. 436 the Hearing Examiner would have dismissed on the merits every charge made in the Commission complaint (A.R. 58).

officers are vested with discretion in the exercise of their powers and the performance of their duties. Different officers or agencies in the determination of matters within their jurisdiction can reasonably reach varying conclusions from identical facts. It is entirely possible that State and Federal administrators of statutes similarly phrased could differ as to whether specific practices were permitted and should be allowed to continue, or were prohibited and should be stopped. If Congress' decision that State policy should control is to be truly respected, each State must be free to make its own judgment and to reflect it either in the institution of a formal proceeding or in informal conference or equally to reflect it in an administrative decision to take no action whatever. As this Court has pointed out in the *Prudential* case (328 U. S. at 431 n. 39):

> "The McCarran Act is, in effect, a determination by Congress that the business of insurance, though done in interstate commerce, is not of such a character as to require uniformity of treatment within the distinction taken in the doctrine of *Cooley* v. *Board of Wardens,* 12 How. 299, except as otherwise expressly declared."

Petitioner's arguments assume that because Federal and State legislation both express a determination that false advertising is contrary to the public interest no conflict is possible in the administration of this legislation. This assumption is the negation of the flexibility of the administrative process. It rests on the unsupported premise that an inevitable inference of State dereliction necessarily arises if State authorities have not instituted proceedings against advertising believed by the Federal Trade Commission to violate the Federal Trade Commission Act. This

assumption is unwarranted, and if accepted would defeat the intent of Congress that State policy is to control even at the price of the greater uniformity which might result from giving the Federal Trade Commission supreme and controlling authority. The only way to avoid unseemly conflicts is to respect the policy of Congress to grant exclusive jurisdiction to the States in areas which the States have occupied by regulatory legislation.

V. Exclusive State regulation of insurance advertising does not result in a "regulatory no man's land"

As we have seen, the Commission in its opinion embraced the theory that under the proviso to Section 2(b) the Commission must retain authority to regulate insurance advertising because Commerce Clause inhibitions prevent the States from legislating to an "extent" sufficient to satisfy the requirements of the proviso. Although counsel for the Commission have abandoned this theory they now advance a somewhat different theory which leads to a remarkably similar result.

The theory appears to be that despite the removal of all Commerce Clause impediments to State regulation of insurance, an application of the McCarran Act according to its plain terms would nevertheless necessarily result in a "regulatory 'no man's land'" which Congress could not have intended (Pet. Br., p. 41). Therefore, the argument proceeds, despite the plain words of the proviso Congress must be presumed to have intended that the Federal Trade Commission Act should continue to apply to the business of insurance when conducted across State lines

unless and until the States affected by that business enact legislation contrary to the terms of that Act. Only in this way, it is asserted, can the common policy expressed in the Federal Trade Commission Act and the many similar State statutes adequately be implemented.[16]

In fact, petitioner nowhere identifies the "regulatory no man's land" and "legal vacuum" to which it frequently adverts as inevitably appearing if the proviso to Section 2(b) is taken as meaning what it says. General quotations from the language of decisions of this Court are not a substitute for scrupulous attention to the precise facts of the present cases.[17]

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[16] This argument overlooks the fact that it is not primarily the policy of the Federal Trade Commission Act but rather the policy and the words of the McCarran Act which are in issue in these cases. Even if the regulatory gap which petitioner attempts to conjure up had a real as opposed to a fanciful existence this Court would have no mandate to fill the gap unless it were the will and intent of Congress that it should be filled. "Since Congress' power in the area of commerce among the States is plenary, its judgment must be respected whatever policy objections there may be to creation of a no man's land." Guss v. Utah Labor Relations Board, 353 U. S. 1, 11.

Counsel place heavy reliance on the fact that one of the declared purposes of the McCarran Act was "to secure adequate regulation and control" of the insurance business (Pet. Br., p. 44). This is precisely why Congress in the statute removed Commerce Clause impediments to the reach of State legislation, thus doing away with any possible constitutionally induced "no man's land".

[17] As the Court of Appeals for the Fifth Circuit unanimously stated (A.R. 116):

> "The Commission urges that a state does not have and never did have the power adequately to control the advertising practices of out-of-state insurance companies doing business within its boundaries. The Congress, seemingly, had no doubt that a state might exercise such power and we have none. * * * (Citing and quoting from Hoopeston Canning Co. v. Cullen,

National and American are both licensed in every State in which they disseminate advertising, and both depend upon the services of licensed local agents. Counsel have conceded that the Commerce Clause presents no obstacle to the application of State statutes regulating insurance advertising. Given these facts, it is difficult to detect the hiatus which counsel profess to fear. Each State is fully competent to regulate the advertising of insurance within its own borders, and together they are necessarily fully competent to regulate that advertising throughout the United States.

Petitioner cites on page 46 of its brief numerous cases which stand for the proposition that the "Fourteenth Amendment imposes substantial limitations on the power of the states to regulate out-of-state transactions". This proposition has no relevance here. If all the States in which an insurance company does business have enacted regulatory legislation, the fact that any single State's legislation may have a narrower geographical incidence than that of the Federal Trade Commission Act does not create a "regulatory no man's land". The real question is whether a State has the power to regulate advertising which is disseminated to the public within its own borders, irrespective of where that advertising originates. It is indisputable that such power exists, *Travelers Health Ass'n* v. *Virginia*, 339 U. S. 643, and that it may be effectively exercised when the disseminator is

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318 U. S. 313).

"If there is an 'irreducible area' of Commission jurisdiction, we are of the firm conviction that the matter presented by the record before us is not within it."

licensed by the State and employs agents also so licensed. *Cf. Robertson* v. *California*, 328 U. S. 440.[18]

There is some suggestion in petitioner's brief that permitting the application of the Federal Trade Commission Act is desirable simply as a matter of convenience, because that Act is nationwide in impact whereas the regulatory statutes of any particular State may have a narrower geographical incidence (Pet. Br., p. 47). This suggestion ignores the fact that in passing the McCarran Act, Congress was concerned not simply with convenience, but with preserving to the States governmental powers which they had long exclusively exercised. As this Court has said in *Connecticut Light & Power Co.* v. *Federal Power Commission*, 324 U. S. 515, 530:

> "[S]tate lines and boundaries cut across and subdivide what scientifically or economically viewed may be a single enterprise. Congress is acutely aware of the existence and vitality of these state governments. It sometimes is moved to respect state rights and local institutions even when some degree of efficiency of a federal plan is thereby sacrificed."

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[18] Petitioner expresses concern over the "acute problem presented when an insurance company employs no local agents and has no office or assets within the State" (Pet. Br., pp. 47-49). We do not deem it necessary to discuss this question since it is in no way presented in these cases. Both National and American are licensed in every State in which they disseminate advertising and employ locally licensed agents in each of these States (N.R. 32, 188; A.R. 69).

For the same reason, it is unnecessary here to discuss counsel's contention (Pet. Br., pp. 45-47) that the State of domicile of an insurance company is constitutionally disabled from regulating the advertising practices of that company throughout the United States.

CONCLUSION

For the foregoing reasons, we respectfully urge that the judgments of the Courts of Appeals must be affirmed.

Respectfully submitted,

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